

APPEAL NO. 041442
FILED AUGUST 9, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 19, 2004. The hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury on _____; that the claimant timely reported his compensable injury of _____; and that the claimant did not have disability. The appellant/cross-respondent (carrier) appealed the hearing officer's injury and timely notice determinations and asserted that the hearing officer erred in excluding Carrier's Exhibit H. The claimant cross-appealed the hearing officer's disability determination based on sufficiency of the evidence grounds. The carrier responded to the claimant's cross-appeal, urging affirmance. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

First we address the carrier's evidentiary objection. The carrier complains that the hearing officer erred in excluding Carrier Exhibit H, a surveillance video of the claimant. To obtain a reversal on the basis of admission or exclusion of evidence, it must be shown that the ruling admitting or excluding the evidence was error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been stated that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The carrier argues that because the "hearing officer relied greatly on the claimant's medical evidence, the effect that the [surveillance] video may have could change the decision regarding compensability." The carrier acknowledges that Carrier's Exhibit G, which was offered and admitted at the CCH, is a written surveillance report of the complained-of exhibit and was created in conjunction of the surveillance video. We cannot agree that the exclusion of Carrier's Exhibit H was reasonably calculated to, and probably did, cause the rendition of an improper judgment. We conclude that the hearing officer did not abuse her discretion in excluding the complained-of exhibit on the grounds of no timely exchange and no good cause shown. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The claimant had the burden to prove that he sustained a compensable injury as defined by Section 401.011(10), that he had disability as defined by Section 401.011(16), and that he gave timely notice of an injury to the employer in accordance with Section 409.001(a). Conflicting evidence was presented on the disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence.

Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations on the appealed issues of compensable injury, disability, and timely notice of injury are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W. 2d 175 (Tex. 1986).

With regard to the notice issue, the carrier argues that the hearing officer relied on the Employer's First Report of Injury or Illness (TWCC-1) to determine whether the claimant timely reported his injury to his employer. Section 409.005(f) provides that the TWCC-1 may not be considered an admission by or evidence against an employer or carrier where the facts are in dispute. Although the hearing officer commented in the Background Information that one of the two TWCC-1(s) in evidence indicate that the claimant reported his injury on _____, the hearing officer also considered the claimant's testimony that he reported his injury to his employer on _____. The hearing officer's finding of fact that the claimant timely reported his injury on _____, may be affirmed, because of the claimant's testimony. See *generally* Texas Workers' Compensation Commission Appeal No. 970933, decided July 7, 1997. The hearing officer may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Additionally, with regard to the notice issue, the carrier attached to its appeal an affidavit that purports to show that the TWCC-1's information is inaccurate. Documents submitted for the first time on appeal are generally not considered unless they constitute admissible, newly discovered evidence. We conclude that this attached document to the carrier's appeal does not meet the requirements of newly discovered evidence necessary to warrant a remand. Having reviewed the document, and given that we have affirmed the hearing officer's notice determination based on the explanation above, we conclude that its admission on remand would not have resulted in a different decision. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the hearing officer's decision and order.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **NORTH AMERICAN SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge